Nos. 09-435 and 09-445

In the Supreme Court of the United States

NEW WEST, L.P., ET AL., PETITIONERS

v.

CITY OF JOLIET, ILLINOIS, ET AL.

TERESA DAVIS, ET AL., PETITIONERS

v.

CITY OF JOLIET, ILLINOIS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a city ordinance condemning a privately owned, federally subsidized, low-income housing project is impliedly preempted by federal law that requires the property to be maintained as low-income housing for 30 years.

2. Whether the Property Clause of the Constitution bars a city's exercise of its eminent domain power against property on which the United States holds a mortgage.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 562 F.3d 830.[1] The opinions of the district court (Pet. App. 19a-29a, 30a-42a) are unreported.

[1] All references to "Pet. App." are to the appendix in No. 09-435.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2009. Petitions for rehearing were denied on July 14, 2009 (Pet. App. 43a-44a). The petitions for a writ of certiorari were filed on October 13, 2009 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA or Act), Pub. L. No. 105-65, Tit. V, 111 Stat. 1384. The Act's stated purposes are, *inter alia*, "to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based [federal] assistance"; "to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities"; and "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation." MAHRA § 511(b)(1), (6) and (7), 111 Stat. 1387. To accomplish those purposes, Congress directed the Department of Housing and Urban Development (HUD) to administer a detailed process through which owners of eligible, federally subsidized, low-income housing are entitled to restructure the financing of their properties. In return, MAHRA requires owners to make needed repairs and to agree to maintain the properties as low-income housing for at least 30 years. MAHRA § 514(e), 111 Stat. 1393. HUD has promulgated exten-

sive regulations governing that process. See 24 C.F.R. Pt. 401, 402.

When the owner of eligible low-income housing seeks to refinance its debt, MAHRA requires HUD to develop a Restructuring Plan. MAHRA § 514(a)(1), 111 Stat. 1392; see 24 C.F.R. 401.100, 401.101 (eligibility criteria). HUD hires a Participating Administrative Entity (PAE) to undertake that project. MAHRA § 512(10) and 513, 111 Stat. 1389. Among other things, the PAE assesses whether there is "adequate[,] available and affordable" alternative housing in the particular market, MAHRA § 515(c)(1)(A), 111 Stat. 1397, and analyzes the property's rent level, debt and expenses, as well as its repair and reserve needs. 24 C.F.R. 401.410-411, 401.451-453. Congress created a specific role for local governments and other interested parties in the lengthy restructuring process, mandating notice and an opportunity to participate. MAHRA § 514(f), 111 Stat. 1394; see also 24 C.F.R. 401.500(a), 401.501(b)(1).

The final Restructuring Plan must "require" the owner to rehabilitate the property as necessary and to provide adequate reserves to maintain it in decent and safe condition pursuant to established standards. MAHRA § 514(e)(5), 111 Stat. 1393. The keystone of MAHRA, however, is Section 514(e)(6), which mandates significant use restrictions on the property. That provision specifies that the Restructuring Plan "shall * * * require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by [HUD], for a term of not less than 30 years." MAHRA § 514(e)(6), 111 Stat. 1393. In addition, those use restrictions "shall be * * * contained in a legally enforceable document recorded in the appropriate records" and "shall be * * * consistent

with the long-term physical and financial viability and character of the project as affordable housing." MAHRA § 514(e)(6)(A) and (B), 111 Stat. 1393; see 24 C.F.R. 401.408(a). Thus, the statutorily required use restrictions are a form of covenant that runs with the land. Congress has accordingly directed HUD or the PAE to "ensure long-term compliance" with MAHRA and the "binding contractual agreements with owners" executed thereunder. MAHRA § 519(a), 111 Stat. 1404; see 24 C.F.R. 401.550.

2. a. Evergreen Terrace I and II are multifamily properties that have long provided housing to low-income residents of the respondent City of Joliet, Illinois (the City). HUD acquired both properties through foreclosure and sold each to their current owners, petitioners New West, L.P., and New Bluff, L.P. (collectively, New West), for $1 in the early 1980s. HUD insured New West's 40-year mortgages on Evergreen Terrace under Section 221 of the National Housing Act (NHA), 12 U.S.C. 1715*l*. In return, New West became subject to Regulatory Agreements explicitly incorporated into the mortgages, as authorized by the NHA, 12 U.S.C. 1715*l*(d)(4). Those agreements required New West to maintain Evergreen Terrace's 356 units as low-income housing for families eligible for housing assistance under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

b. In November 2001, New West informed HUD of its desire to restructure its Evergreen Terrace debt under MAHRA, thereby triggering the statute's mandatory process. See Pet. App. 6a. HUD selected the Illinois Housing Development Authority (IHDA) to serve as the PAE. IHDA found "a critical need" to preserve Evergreen Terrace. C.A. App. 100. When the City,

which participated in the restructuring process, challenged IHDA's findings, HUD hired another PAE, Heskin Signet Partners, to perform a second analysis. Heskin Signet confirmed IHDA's findings: there is "a compelling need to preserve the housing stock represented by Evergreen Terrace I and II due to the absolute lack of alternative housing for the approximately 600 current residents." *Id.* at 101. Heskin Signet then developed a plan for the cost-effective rehabilitation and ongoing maintenance of the property.

On the basis of the two independent PAE analyses and after meetings with the City, New West, and tenants, HUD approved a final Restructuring Plan for Evergreen Terrace in September 2006. Two months later, New West obtained a mortgage from HUD to replace its prior HUD-insured mortgage, and it executed and recorded the 30-year Use Agreements required by MAHRA Section 514(e)(6). New Regulatory Agreements and contracts for Section 8 housing assistance for the tenants were also executed. C.A. App. 102.

3. In 2005, after the issuance of both PAE reports and as the restructuring process was nearing completion, the City declared Evergreen Terrace to be a "public nuisance," and it enacted an ordinance condemning the property. C.A. App. 312-313, 315-318. Through its exercise of eminent domain, the City proposes to tear down Evergreen Terrace and to redevelop the property for uses other than low-income housing. *Id.* at 316. Soon after passing the ordinance, the City filed this condemnation action in state court, and the case was removed to federal district court. See Pet. App. 4a.

HUD and New West raised preemption and other defenses to the City's action. As HUD explained, Congress created the MAHRA restructured financing pro-

cess in order to preserve the nation's stock of low-income housing in partnership with the private sector. HUD argued that the City's proposed condemnation of Evergreen Terrace and diversion of the property to uses other than low-income housing—without HUD's consent—would pose "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in MAHRA. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). HUD therefore contended that, under the Supremacy Clause of the Constitution (Art. VI, Cl. 2) and implied conflict preemption, the City's proposed taking of Evergreen Terrace must yield to the agency's determination in the MAHRA restructuring process that the property can and must be preserved in order to meet the "compelling need" for such housing in the community. C.A. App. 101.

The City moved for judgment on the pleadings with respect to the parties' preemption defense, and the district court granted its motion. Pet. App. 30a-42a. Relying on a discussion of different statutes in a related case in which HUD was not a party, see *New West, L.P.* v. *City of Joliet*, 491 F.3d 717, 721 (7th Cir. 2007), the district court held that MAHRA does not preempt the City's proposed exercise of its eminent domain power. Pet. App. 40a-41a. In a later order, the district court denied motions for summary judgment filed by HUD and New West, which argued, among other things, that the City's action was barred by the Property Clause of the Constitution (Art. IV, § 3, Cl. 2). Pet. App. 19a-29a.[2]

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[2] Several Evergreen Terrace tenants—petitioners in No. 09-445—intervened as defendants in the City's action in January 2008. Pet. App. 28a-29a.

HUD and New West petitioned the district court to certify for interlocutory review pursuant to 28 U.S.C. 1292(b) its order rejecting their implied preemption defense. New West also asked the district court to certify its order rejecting certain other defenses that it had raised in its summary judgment motion. The court granted HUD's and New West's requests, and the court of appeals accepted review.

4. The court of appeals affirmed. It found no "clear statement" or "federal command" in the housing laws at issue that preempted the City's ordinance authorizing the condemnation of Evergreen Terrace, explaining that the "findings" and "purposes" provisions of those statutes were insufficient to establish Congress's intent to preempt. Pet. App. 12a-14a. Relying on *Wyeth*, 129 S. Ct. at 1199-1204, the court of appeals further found it significant that there was no "preemptive regulation with the force of law." Pet. App. 8a; see also *id.* at 11a, 12a. The court concluded that there was no clash of goals and objectives because several HUD regulations demonstrated the agency's intent not to preempt the condemnation of federally subsidized housing for low-income families. *Id.* at 8a-10a. The court also found it "hard to see any conflict between federal and state goals" because participation in the involved low-income housing program is not "compulsory," and "it is not a violation of federal law for a given owner to remain outside the program." *Id.* at 9a.

Thus, according to the court of appeals, "there is no *affirmative* declaration of preemption in any statute or rule, no concrete conflict between condemnation and any part of [MAHRA], and no good reason to think that [MAHRA] contravenes HUD's own regulations under § 8 and [NHA] § 221." Pet. App. 11a. The court added:

> It might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished.

Id. at 15a.

The court of appeals also rejected several additional arguments advanced by New West and the tenants based on the Contract and Property Clauses of the Constitution (Art. I, § 10, Cl. 1; Art. IV. § 3, Cl. 2) and the principle of intergovernmental immunity. Pet. App. 17a-18a. The court found no authority holding that "the Property Clause (or any other part of the Constitution) treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the theory that the state is 'really' regulating the federal interest as a lender." *Id.* at 18a. HUD, New West, and the tenants sought rehearing en banc, and the court denied the petitions. *Id.* at 43a-44a.

ARGUMENT

The court of appeals erred in ruling that MAHRA does not preempt the City's condemnation of Evergreen Terrace. HUD determined, in the extensive MAHRA process in which the City participated, that Evergreen Terrace could be rehabilitated and must be preserved in order to meet the "compelling need" for low-income housing in the Joliet community. C.A. App. 101. HUD accordingly provided New West with restructured financing for the property, and, in return, New West agreed in a recorded, "legally enforceable" document—as MAHRA Section 514(e)(6) explicitly requires—to

maintain the property as low-income housing for at least 30 years. The City now seeks to override that process and to veto HUD's determination by condemning Evergreen Terrace and diverting the property to other uses. That effort is contrary to the cooperative, participatory role that Congress prescribed for local governments in the MAHRA restructuring process and presents "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in MAHRA. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The City's condemnation ordinance and action are therefore preempted.

Nonetheless, review by this Court is not warranted at the present time. This case is the first in which a State or local government has sought to condemn, without HUD's consent, a property that has undergone MAHRA restructuring. The Court's ultimate resolution of the preemption question presented by both petitions would benefit from further consideration in the lower courts. Similarly, the Property Clause question presented by New West's petition for a writ of certiorari has not previously been addressed by any other court of appeals. Further review therefore is not warranted.

A. 1. a. The court of appeals erred in relying on the absence of "a preemptive regulation with the force of law" in concluding that preemption could not be "inferred from a clash of goals and objectives" in the context of this case. Pet. App. 8a.; see *id.* at 11a, 12a. The court based that conclusion on this Court's recent decision in *Wyeth*, 129 S. Ct. at 1199-1204. But neither *Wyeth* nor any other decision of this Court holds that a preemptive regulation is necessary in order to find "frustration of purpose" preemption. In fact, this Court

rejected that argument in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000):

> To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent * * * apparently welcomes that result, at least where "frustration-of-purpos[e]" pre-emption by agency regulation is at issue. * * * We do not.

Id. at 885.

Wyeth is not to the contrary. There, the Court found no preemption because, it concluded, state failure-to-warn claims did not present an obstacle to the accomplishment of the purposes of federal drug labeling requirements. 129 S. Ct. at 1204. The Court declined to give deference to the position of the Food and Drug Administration (FDA) that there was preemption, because that position was expressed only in a preamble to a rule, was contrary to "Congress' purposes" in the federal drug laws, and was a reversal of FDA's "own longstanding position without * * * a reasoned explanation" or "any discussion of how state law has interfered" with federal regulation. *Id.* at 1201. Citing *Geier*, *supra*, the Court explained that "an agency regulation with the force of law can pre-empt conflicting state requirements." *Wyeth*, 129 S. Ct. at 1200. But the Court noted that, even when such a regulation exists, the Court has "performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* at 1200-1201.

Thus, while *Wyeth* reaffirmed that a properly promulgated agency regulation can preempt state law, 129

S. Ct. at 1200, *Wyeth* does not support the weight the court of appeals attached to the absence of such a regulation here.

b. The court of appeals also misunderstood the nature of the lengthy MAHRA restructuring process prescribed by Congress. The court acknowledged that "[i]t might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock." Pet. App. 15a. The court mistakenly concluded, however, that "no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished." *Ibid.* In fact, the "sensible" process the court of appeals posited is precisely what the MAHRA entails and what occurred in this case.[3]

As explained above, before HUD can approve a Restructuring Plan, MAHRA requires an assessment of the "adequate[,] available and affordable housing" in the particular market. MAHRA § 515(c)(1)(A), 111 Stat 1397. In addition, the owner and PAE must evaluate the project's "rehabilitation needs," and the owner is "require[d] * * * to take such actions as may be necessary to rehabilitate [the property], [to] maintain adequate reserves, and to maintain the project in decent and safe condition." MAHRA § 514(e)(3) and (5), 111 Stat. 1393. Local governments are given notice and the opportunity to participate in the restructuring process. MAHRA § 514(f)(1) and (2), 111 Stat. 1394.

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[3] The court of appeals mistakenly believed that HUD's preemption argument rested solely on the NHA and MAHRA "findings" and "purposes" clauses, overlooking, in particular, the operative provisions of MAHRA cited and discussed by HUD. See Pet. App. 8a, 12a-14a.

Pursuant to those statutory requirements, HUD obtained two independent evaluations of the need for Evergreen Terrace, as well as the feasibility and cost of rehabilitating the property. Both reports concluded that there was a "compelling need" to preserve Evergreen Terrace because of "the absolute lack of alternative housing" in the Joliet area for Evergreen Terraces's 600 low-income residents. C.A. App. 101. The reports also concluded that Evergreen Terrace could be "repaired in a cost-effective manner." *Ibid.* Based on those analyses and other information obtained during the restructuring process, HUD approved the Restructuring Plan and provided new mortgages to New West, and New West executed the 30-year Use Agreements mandated by MAHRA Section 514(e)(6). And contrary to the court of appeals' suggestion that the MAHRA process is conducted "without notice to the cities whose powers will be diminished," Pet. App. 15a, the City not only received the notice required by MAHRA Section 514(f) but also participated actively in the restructuring process. See *New West, L.P.* v. *City of Joliet*, No. 05-C-1743, 2006 WL 2632752, at *1-*2 (N.D. Ill. Sept. 8, 2006), rev'd, 491 F.3d 717 (7th Cir. 2007).

Thus, MAHRA prescribes an administrative process that essentially constitutes the "sensible" system the court of appeals acknowledged would preempt the City's condemnation action. Pet. App. 15a. That process, which is established by the statute itself, makes unnecessary a HUD regulation specifically stating MAHRA's preemptive effect.[4]

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[4] The decision below also appeared to rest on two incorrect factual assumptions. First, the court cited various HUD regulations that refer to the condemnation of low-income housing properties, see Pet. App. 10a (citing 24 C.F.R. 245.405, 248.101 and 970.3), and questioned "the

c. The court of appeals erred in reasoning that MAHRA lacks preemptive effect because it permits, but does not mandate, property owners to restructure their financing under its terms. See Pet. App. 9a. That proposition is inconsistent with *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), which held that a Federal Home Loan Bank Board (the Board) regulation that permitted, but did not require, federal savings and loan associations to include "due-on-sale" clauses in their mortgage contracts preempted state law that restricted the use of such clauses. This Court reasoned that such state law posed an obstacle to an objective that the Board considered essential and, in addressing an argument similar to the view of the court of appeals, stated that "[t]he conflict [between federal and state law] does not evaporate because the Board's regulation simply permits, but does not compel, federal sav-

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point of a special rule for applying the proceeds of condemnation if, as HUD argues, condemnation is always preempted." *Ibid.* But apart from the fact that the cited regulations implement different housing programs not at issue here, HUD has never contended that a city's condemnation of any federally subsidized low-income housing project is always preempted by federal law. The key factor is HUD's determination of the viability of and need for the project in accordance with statutory mandates for the particular federal housing program involved.

Second, the court stated that "[p]rivate owners are entitled to withdraw their properties from the program at any time despite their 20-year and 30-year promises" by paying off their federally insured loans. Pet. App. 9a (citing 24 C.F.R. Pt. 248). That is incorrect. The regulatory provisions the court cited as support for that assertion were promulgated under a different statute. See Emergency Low Income Housing Preservation Act of 1987, 12 U.S.C. 1715*l* note; Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. 4101 *et seq.* Prepayment of a loan on a property that has undergone MAHRA restructuring does not extinguish the statutorily mandated and recorded 30-year use restriction.

ings and loans to include due-on-sale clauses in their contracts." *Id.* at 155-156.

While the decision to participate in a federally subsidized low-income housing program is voluntary, once a private owner decides to participate, federal law imposes requirements on that owner and regulates its participation in the program. Thus, the focus must be on what Congress intended when it created the program and imposed those requirements, not on whether participation in the program is voluntary or mandatory. See *Wyeth*, 129 S. Ct. at 1194 ("the purpose of Congress is the ultimate touchstone in every pre-emption case") (citation omitted).

2. Despite the errors in the decision below, this Court's review is not warranted. This is the first case in which a state or local government has sought to condemn and divert to a different use a federally subsidized housing property that has undergone restructuring under MAHRA and that is therefore subject to the statute's 30-year use restriction.

a. In their petition for a writ of certiorari, the Evergreen Terrace tenants contend that the circuits are divided on whether a federal preemptive regulation with the force of law is necessary to a finding of implied preemption. 09-445 Pet. 17-24. The court of appeals in this case does not appear to have held that such a regulation is always necessary. See Pet. App. 9a, 10a-11a. By the same token, that issue was not squarely presented in the courts of appeals cases upon which the tenants rely. In *City of Morgan City* v. *South Louisiana Electric Cooperative Ass'n*, 31 F.3d 319, 324 (5th Cir. 1994), cert. denied, 516 U.S. 908 (1995) (*Morgan City*), and *Public Utility District No. 1 of Pend Oreille County* v. *United States*, 417 F.2d 200, 201 (9th Cir. 1969) (*Pend Oreille*),

the courts of appeals held that a local jurisdiction's attempt to condemn certain property of a utility financed by the federal government under the Rural Electrification Act of 1936 (REAct), 7 U.S.C. 901 *et seq.*, was preempted because it would frustrate the accomplishment of Congress's goals and objectives under that act.[5]

As in this case, the federal government's preemption argument in *Morgan City* and *Pend Oreille* was based on the effect of the governing statutory scheme and did not rely on a preemptive regulation. Thus, the holdings in *Morgan City* and *Pend Oreille* implicitly suggest that a preemptive regulation with the force of law is not necessary for a finding of implied preemption. But the need for a regulation *vel non* does not appear to have been raised in either case, and neither court addressed the issue. And in any event, this Court's decision in *Geier*, 529 U.S. at 885, makes clear that a federal regulation can preempt state law but is not required in all instances of implied preemption.

Morgan City and *Pend Oreille* also demonstrate that a sovereign's historic power of eminent domain is not absolute or immune to implied preemption by federal law.[6] In a general sense, those decisions are thus in ten-

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[5] Cf. *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 388-389 (1983) (if the federal government changes policy and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy, "it would of course pre-empt" state action); *City of Stilwell* v. *Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1045 (10th Cir. 1996) (REAct did not preempt condemnation, where facts and particular statutory provisions differed from those at issue in *Morgan City* and *Pend Oreille*, and federal government did not oppose condemnation).

[6] Similarly, *Hayfield N. R.R.* v. *Chicago & N. W. Transp. Co.*, 467 U.S. 622 (1984), confirms that a State's invocation of the power of eminent domain does not preclude a finding of preemption. While holding

sion with the result and reasoning of the decision below. See Pet. App. 16a-17a. But because the preemption inquiry is necessarily statute-specific, there is also no direct conflict between *Morgan City* and *Pend Oreille* and the decision in this case.

b. The Evergreen Terrace tenants further contend that the circuits are divided on whether the voluntary nature of participation in a federal program is relevant to the preemption inquiry. 09-445 Pet. 25-26 (citing *Morgan City*, 31 F.3d at 324; *Pend Oreille*, 417 F.2d at 202-203; and *Forest Park II* v. *Hadley*, 336 F.3d 724 (8th Cir. 2003) (*Forest Park*)). There is no direct conflict among the circuits on that issue.

It is true that, although participation in the federal rural electrification program is not compulsory, the courts in *Morgan City* and *Pend Oreille* held that federal law preempted the proposed condemnation of cooperative utility property financed under the REAct. And in *Forest Park II*, 336 F.3d at 731-734, the court held that a state law that effectively prevented the owner of federally subsidized housing from voluntarily withdrawing from the particular housing program was preempted because it interfered with the framework established by Congress. Thus, the voluntary nature of the federal programs at issue in all three cases did not preclude a finding of preemption. Nonetheless, because those decisions did not address that factor, they do not squarely conflict with the position articulated in the decision below.

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that there was no preemption of the use of state eminent domain authority to condemn a segment of railroad track that had been abandoned pursuant to federal law, *id.* at 637, the Court reached that conclusion only after thorough consideration of implied preemption arguments.

c. New West argues that review of the court of appeals preemption ruling is warranted because the court failed to address the fact that "Congress *expressly* delegated to HUD the power to decide whether and how Evergreen Terrace should be preserved as affordable housing for the next 30 years." 09-435 Pet. 20. According to New West, HUD's determination in that regard is entitled to deference because the agency was "acting within the scope of its congressionally delegated authority." *Id.* at 21 (quoting *New York* v. *FERC*, 535 U.S. 1, 18 (2002)).

New West's argument, however, is misplaced. As the Court explained in *New York*, 535 U.S. at 17, whether Congress has delegated to a federal agency the authority to displace state action is a "quite different legal question[]" from whether state law conflicts with federal law. This case involves only the latter question. Delegation can arise as an issue when an agency has promulgated a regulation or rendered a decision expressing an intent to preempt state law and that determination is challenged as beyond the scope of the agency's statutory authority. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57 (1988). There is no such regulation or order in this case.

B. The portion of the decision below rejecting New West's argument that the Property Clause prevents the City from exercising its eminent domain power over Evergreen Terrace also does not warrant review. See 09-435 Pet. 25-28. The court recognized that HUD has an interest as "a secured creditor" of New West, but it found no basis for concluding that the Property Clause "treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the the-

ory that the state is 'really' regulating the federal interest as a lender." Pet. App. 18a.

The federal government's property interest in Evergreen Terrace is more significant than the court of appeals' discussion suggests. The Property Clause of the Constitution (Art. IV, § 3, Cl. 2) gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This Court has interpreted Congress's power concerning "other Property" expansively to include the "regulation of all other personal and real property rightfully belonging to the United States." *Ashwander* v. *TVA*, 297 U.S. 288, 331 (1936) (citation omitted). See generally *Kleppe* v. *New Mexico*, 426 U.S. 529, 538-541 (1976) (Property Clause power reaches beyond territorial limits). The interests of the United States, first as mortgage-insurer and then as mortgage-holder for Evergreen Terrace, are therefore property interests within the meaning of the Property Clause.

In *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987), however, this Court explained that "'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law. The Property Clause itself does not automatically conflict with all state regulation of federal land." *Id.* at 580 (citing *Kleppe*, 426 U.S. at 543). The Court therefore concluded that, despite Congress's "plenary power" over federal property, "even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.'" *Id.* at 593 (citation omitted). Thus, a Property Clause issue ultimately requires con-

sideration of the same factors that apply to preemption under the relevant federal statutes. The Property Clause does not provide an independent defense to the City's proposed condemnation of Evergreen Terrace.

In any event, no other court of appeals has had occasion to address the effect of the Property Clause on the proposed condemnation of federally subsidized low-income housing. Further review of that issue is accordingly not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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